SEPARATION OF POWERS AND FEDERALISM IN AFRICAN CONSTITUTIONALISM:
THE SOUTH AFRICAN CASE

by

André MBATA BETUKUMESU MANGU

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Summary:

This short dissertation deals with separation of powers and federalism in African constitutionalism through the South African case. It investigates the extent to which the new South Africa complies with these two principles.

The separation of powers in the new South Africa gives rise to a sui generis parliamentary regime, which is borrowing both from the Westminster model and the presidential one. On the other hand, the principle of federalism has been taken into consideration seriously, but South Africa has not become a fully-fledged federation.

The result is a well-matched marriage between semi-parliamentarism and quasi-federalism, which is the South African contribution to constitutionalism and democracy required by the African Renaissance.

The dissertation comes to the conclusion that all in all the new South Africa complies with the two constitutional principles under consideration. It is a constitutional state, one of the very few exceptions on a continent laboriously emerging from authoritarianism.

Key terms:

Africa; Constitution; Constitutional Court; Constitutionalism; Courts; Democracy; Federalism; Government of National Unity; Parliament; Political Regime; President; Provinces; Purposive Approach; Separation of Powers; South African State
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INTRODUCTION

Constitutionalism means, in the words of Louis Henkin, "that the government to be instituted shall be
constrained by the Constitution and shall govern only according to its terms and subject to its
limitations, only with agreed powers and for agreed purposes." The concept of limited powers is
central to any understanding of constitutionalism.²

According to Olivier³ constitutionalism signals the success of the revolution of the powerless, the
oppressed, persecuted minorities and individuals. It reflects a fear of despotism, of totalitarianism or of a
 tyranny in which is likely to result an unhindered power of domination whether it be wielded under the
name of people or by a transient majority.⁴

Many factors limit the power of all rulers, but constitutionalism signifies the legal and constitutional
limitations of the powers of a government. It harks back to the notion of the liberal state, of the minimal
state.⁵ That is quite the opposite of what Lord Devlin⁶ called "the totalitarian state". Constitutionalism
requires adherence to Dicey's "rule of law".⁷ It means as James Harrington⁸ and Justice Jackson⁹
described it, "a government of laws and not of men" and corresponds to the German concept of
"Rechtsstaat" which Olivier¹⁰ translates as a "law state". True constitutionalism first emerged in the
United States of America.¹¹

¹ Quoted by Olivier PJJ "Constitutionalism in the new South Africa" in Licht RA & De Villiers B (eds) South
² See Botha H "The values and principles underlying the 1993 Constitution" 1994 SAPR/PI, 242; De Villiers B
"Federalism in South Africa : implications for individual and minority protection" 1993 SAJHR 375; Olivier PJJ op
cit 20-21; Lenaerts K "Constitutionalism and the Many Faces of Federalism" 1990 The American Journal of
Comparative Law 205.
³ Olivier PJJ op cit 20.
Tenekides G "The relationship between Democracy and Human Rights" in Democracy and Human Rights
(1987)14; Baldwin FN "Constitutional Limitations on Government in Mexico, the United Nations, and Uganda" in
⁵ Olivier PJJ op cit 20,21.
⁷ See Tenekides G op cit 22-23.
⁸ Quoted by Olivier PJJ op cit 20.
⁹ Quoted by Currie DP "Separation of powers in the Federal Republic of Germany" 1993 The American Journal of
Comparative Law 217.
¹⁰ Olivier PJJ op cit 26.
¹¹ Stern K "The genesis and evolution of European-American constitutionalism: some comments on the
fundamental aspects" 1985 CILSA 196.
Crucial for the genesis of the constitutional state and the understanding of constitutionalism is the concept of a Constitution as the supreme body of fundamental rules. Nevertheless, even dictatorships, military or former rebel captain-led regimes, claim to have Constitutions and to have established constitutional states in their countries! So what do Constitutions in our time mean to the people, particularly in the Third World and in Africa? Karl Loewenstein points out that "they mean, next to nothing, or very little." A state is not genuinely constitutional simply because it has a Constitution. It achieves that quality or status only when the Constitution enacted or approved by the people is the supreme law of the land; when it has some content and acquires a practical significance, in other words, when the principles and rights enshrined in it can be translated into practice.

The Constitution is a set of principles and values expressing the ideal to which a political community has committed itself. Stern holds that a Constitution is valid only if it is recognised and applied; recognised in the sense that the people identify themselves with the principles and rights it embraces.

In the modern sense, the Constitution is the creation of the people, the "pouvoir constituent". Since it comes from the sovereign people, the Constitution ranks higher than any other authority. Constitutionalism is therefore closely linked to democracy and implies legitimacy, which refers to the specific consent of the people. Legitimacy stricto sensu is a judicial concept and is often taken for legality; but it is more, it is a sociological concept. There is no question of legitimacy of power if the government is not popularly elected.

Separation of powers is one of the "essential principles" of constitutionalism and democracy. On the other hand, "as a system of divided powers, federalism proceeds from the very essence of constitutionalism, which is limited government operating under the rule of law." Both principles are based on a similar conception, that is the protection of liberty from tyranny. Other essential values implied are human rights which have become dependent on constitutionalism particularly since the end of the second World War.

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13 Quoted by Baldwin FN op cit '92.
15 See Botha H op cit 233, 241; Kruger J "Is interpretation a question of common sense? Some reflections on value judgments and section 35" 1995 CILSA 1-29; Olivier PJJ op cit 21-22; Stern K "A society..." 241-242.
17 Stern K "The genesis..." 189,190.
18 Botha H op cit 234-236.
19 Tenekides G op cit 20.
21 See Lenaerts K op cit 205; De Villiers B "Federalism in South Africa..."375
22 See CILSA 1995 (6) BCLR 665(CC) at para 791 B; Cerification of the Constitution of the Province of KwaZulu-Natal 1996 (11) BCLR 1419 (CC) at paras 1426 1--1427A.
Despite unfortunate experiences of coups d'Etat by unrepentant "political dinosaurs" or novice dictators from rebels ranks, constitutionalism is needed to build and to consolidate democracy in Africa after decades of apartheid and generalised military or one-party rule.

In South Africa, the apartheid state has collapsed and a new South Africa has come to life subsequently by the adoption of the interim Constitution now superseded by the 1996 Constitution.

The Constitution provides for a substantive Bill of Rights and purports to build a constitutional state with the Constitutional Court as the guardian of this constitutionalism.

This short dissertation is not in keeping with the "afro-pessimism" which is rampant in the social sciences. Separation of powers and federalism in African constitutionalism are examined in the light of the new South African constitutional law which may inspire other African states to the path of constitutionalism and is definitely a South African contribution to the "African Renaissance".

It is contended that South Africa has become a constitutional state and complies to a great extent with the principles of separation of powers and federalism. However - that is the other face of Janus - the South African "model" does have some way to go and lessons from such a constitutional analysis may be also useful for South Africa herself.

The paper consists of three parts. First of all, the principles of separation of powers and federalism are briefly revisited. Thereafter follows an investigation of each of them in the new South African Constitution. Finally, a conclusion ends the dissertation.

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26 Executive Council of the W(estern) Cape Legislature and Others v Pres(ident) of the Rep(ublic) of S(outh) A(frica) and Others 1995(10) BCLR 1269 (CC) at para 1339 B.
28 The concept is currently abusively attributed to Thabo Mbeki, the South African Deputy President. Yet we discussed it at length and defined its scope two years ago during the International Colloquium on the "Works of Cheikh Anta Diop : African Renaissance on the eve of the Third Millennium" (Cheikh Anta Diop University, Dakar, 1996). See Mangu MB "Renaissance de l'Afrique et la Question de l'Edification d'un Etat confédéral démocratique en Afrique" 1996 Paper for the Colloquium 1-22.
1 REVISITING THE PRINCIPLES OF SEPARATION OF POWERS AND FEDERALISM

A concise discussion of both the doctrines of separation of powers and of federalism proves useful prior to assessing the principles of separation of powers and federalism in the new South African Constitution that confers the paramount responsibility of "guardian of constitutionalism" on the Constitutional Court.

1.1 Separation of Powers and Federalism

1.1.1 Separation of Powers

There has been much debate on the meaning of the separation of powers. Ultimately, a minimal consensus has emerged on its scope and the principle has evolved in contemporary constitutional law due to changing historical and political circumstances.

1.1.1.1 Origin and Justification of the Principle of Separation of Powers

The separation of powers principle originated from philosophical and political thinking by the end of the Middle Ages. It thereafter came to be applied by political actors in Western Europe and in the United States of America. The first modern design of the principle is to be found in the writings of John Locke. Montesquieu is, however, the first who gave it political paramount importance and he remains "the oracle who is always consulted and cited on this subject."

According to Van der Vyver, the idea of separation of powers propounded by Montesquieu eventually developed into a norm comprising four basic precepts or principles:

a) the principle of trias politica, that requires a formal distinction to be made between the legislative, executive and judicial components of state authority;

b) the principle of the separation of personnel serving in each of the three branches of state authority or under its guidance;

c) the principle of the separation of functions between the three organs of state authority; and

d) the principle of checks and balances requiring that each organ be entrusted with special powers designed to serve as checks on the exercise of functions by the others in order to come to an equilibrium.

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30 See Van der Vyver JD "Political power constraints..." 419-420; Idem "The separation of powers" 178-179.
Of the above precepts or principles, the principle of checks and balances is arguably the most discussed by authorities and deserves a brief comment, especially on judicial review which is one of the checks and balances.

Judicial review represents the special contribution of the United States to the notion of separation of powers. It lies at the heart of constitutionalism. As a requirement of the principle of separation of powers, judicial review was instituted to allow courts to strike down laws enacted by elected representatives of the people in Congress. That was a fundamental shift away from the conception of the British legal order founded on the supremacy of Parliament.

According to Feliciano, "judicial review is essential for the maintenance and enforcement of the separation of powers and the balancing of power among the three departments of government". However, it is also a limitation on the principle of separation of powers in that by striking down laws, the judiciary encroaches upon the functions of the legislature. That is the paradox of judicial review.

The embodiment of judicial review in many true Constitutions has broken down a longstanding arrogance of the "representatives of the people" vis-à-vis other branches of government. The conclusion reached in the end is that the people, not the institutions of government, are sovereign. In democracy, each branch derives its powers from the people and these powers are subject to limitation imposed by the people through the Constitution. Each branch serves the sovereign people and no branch can rightly claim to be its sole representative. Each branch, in its own way, is the people's agent, its fiduciary for certain purposes, whatever its manner of selection. Accordingly, each is democratic.

Long considered an abuse or usurpation of powers by judges and anti-democratic, judicial review is now recognised as legitimate and democratic. The contention that judges are not accountable has proven to be a rearguard action from other branches of government, especially Parliament, to retain unrestricted and unhindered power. As Charles L. Black pointed out in regard to the American case,

33 Levi EH op cit 376.
34 Feliciano FP op cit 23.
35 Levi EH op cit 385-386.
37 Feliciano FP op cit 29.
38 Quoted by Feliciano FP op cit 29.
“those who questioned the legitimacy of judicial review on the basis of, among other things, its counter-majoritarian features, tended quite naturally to urge judicial restraint and passivity”. There is no longer any doubt that, despite their independence and their alleged undemocratic appointment, judges are accountable to the people.39

The doctrine of separation of powers assumes that power corrupts and separation of powers is essential to liberty and democracy. Montesquieu rightly held that “all would be in vain if the same person, or the same body of officials, be it the nobility or the people, were to exercise these three powers: that of making laws; that of executing public resolutions; and that of judging crimes and disputes of individuals”.40

The end result of the concentration or accumulation of all powers is despotic government, tyranny or suppression of all form of liberty.41 Gordon Wood42 took the view that the abuse of power by any branch of the government, even, and for some especially, by the traditional representatives of the people, is a “tyranny”. Jefferson43 referred to it as “elective despotism” and made it clear that “elective despotism was not the government we fought for”.

To prevent the “monster” from rising, Madison44 urged that “ambition (of one power should) be made to counteract ambition (of another power)” in the same way as Montesquieu demanded that “le Pouvoir arrête le Pouvoir”.

1.1.1.2 Separation of Powers in contemporary Constitutional Law

No country in the world strictly applies the norms included in the theory of separation of powers and many differences have emerged in the approach to it. There is no universal model of separation of powers. No constitutional scheme can reflect a complete separation of powers; the scheme is always one of partial separation.45 Even in America, following the principle of checks and balances, there is no drastic separation of powers. The Founders did not erect walls as a way to defend each branch’s authority.46 All powers have to collaborate, given that they all have to serve the same sovereign.
namely the people. Moreover, the advent of political parties with the possibility for a winner party to lead both the legislature and the executive has reinforced collaboration and undermined the principle of separation of powers.

Of all the components of the separation of powers, the only one to have survived in strength and is respected perhaps in all the states, is the principle of the trias politica requiring a formal classification of the ramifications of state authority into the legislative, executive, and judicial branches of government.

The most fundamental aspect of the separation of powers is that there be a separation between the judiciary and the other two "political" branches of government.47

1.1.2 Federalism

Federalism is also a form of "separation of powers", albeit not in the sense in which the latter is generally understood by the doctrine. It is concerned with the "vertical" separation of powers between the central authority of state and its provincial or regional units. The principle of federalism does, however, have its own origin and justification. Its proponents have politically justified it and its very content emerges from its distinction from some related concepts. The principle has also evolved in contemporary constitutional law.

1.1.2.1 Origin and Justification of the Principle of Federalism

The first and most serious constitutional application of federalism has been made in the form of federation in the United States of America. Federalism is linked to constitutionalism in the Tenth Amendment to the United States Constitution.48

A cogent argument for federalism is that it tends to facilitate and foster democracy. It also has to do with the protection of minorities and human rights. Federal solutions are the means to enhance democratic republicanism in complex societies. They are often the best ways to resolve intractable ethnic conflicts and to protect diversity through a combination of self-rule and shared rule within a framework of power sharing. Federal government therefore possesses several merits.49

48 Lenaerts K op cit 205 (Footnote 1).
Federalism, federation and confederation are often used loosely and hence confusingly. However, they are not necessarily synonymous.

Federalism is a normative and philosophical concept based on the notion that the greatest human fulfilment is to be found through participation in a wider community that, at the same time, favours diversity and protects individuality. Federalism or the federal principle therefore expresses a philosophical and/or ideological idea that a political organisation should seek to achieve both political integration and political freedom by combining shared rule on some matters with self-rule on others or cooperation and autonomy.

In essence, federalism means self-rule plus shared rule. It implies a way of constitutional and political thinking; in other words, a culture. As a political and legal philosophy, federalism adapts itself to all political contexts on both municipal and international levels, wherever and whenever two basic prerequisites are fulfilled: the search for unity combined with genuine respect for the autonomy and the legitimate interests of the participant entities.

Lenaerts contends that the many faces of federalism can be propounded in two basic models, which are integrative federalism and devolutionary federalism. The former refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities. The latter, that is devolutionary federalism, refers to a constitutional order that redistributes the powers of a previously unitary state amongst its component entities.

A federation is a union of state-like bodies in which legislative and executive powers are divided between a central or federal government on the one hand and the governments of the constituent parts on the other hand. For the purposes of international law, such a union is a single state. A federation may be the practical embodiment of either integrative federalism or devolutionary federalism. As a rule of thumb, the accession to federation by means of a centrifugal process, that is devolutionary federalism or top-down federalisation, is more difficult and takes longer than the traditional process whereby states come together to form a closer union by integrative federalism.

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50 Watts R op cit 77.
51 On the definition of federalism, see De Villiers B “Federalism in South Africa...” 375-377; Lenaerts K op cit 205-208; Van Wyk D “Looking at the ‘new’ South Africa: thoughts about federation and federalism” 1991 SAPRPL 97-98; Watts R op cit 76-78.
53 See Van Wyk D op cit 98; Elazar DJ op cit 29.
54 Pescatore quoted by Lenaerts K op cit 206 (Footnote 4).
55 Op cit 206-207.
57 De Villiers B “Federalism in South Africa...” 382.
The combination of shared rule and self-rule in a federal framework entails some principles on which a
federation is based, namely, autonomy, co-operation, subsidiarity, participation and a judicial umpire. The
constitutional division of powers between the central and regional governments, guaranteeing that
each has a certain sphere of autonomy, is considered the most important characteristic of a federal
form of state or the lowest common denominator for federalism.

The assessment whether a political system is a fully-fledged "federation" must be based not solely on
the constitutional structure, but also on the way in which the political system actually operates. It must
be stressed that there is no single pure model of "federation".

A confederation, on the other hand, is an alliance between a number of sovereign, independent states,
based on a treaty which serves to advance a number of common goals such as defence or economic
co-operation. The separate existence of the members as states under international law is in no way
affected; a confederation is a "constellation of states".

Federation and confederation are the major practical embodiments of federalism and particular federal
political systems. Federalism as a political/ideological idea is wider than both of them, but a federation
or a confederation without some matching kind of federalism is impossible. On the other hand, unitary
systems can also have strong federalist features.

1.1.2.2 Federalism in contemporary Constitutional Law

A federal state was a flagrant exception as the unitary state was the rule a few years ago. Even in
America, the feeling was that federalism had lost momentum. Accordingly, Rabkin contended that
federalism had become "a fighting banner with no more inspirational force than wet laundry". Yet the
contrary is being proven by the changes that have recently occurred, are still occurring or are being
demanded in Eastern Europe, Western Europe and Africa. The number of federal states is increasing.

In Eastern Europe, unitary and centralised states such as the Soviet Union and Yugoslavia collapsed
and gave way to many independent states. In Western Europe, federalism has also gathered
momentum in several countries (Belgium, Spain, Ireland, Germany...) and the European Union has
emerged as a confederation. On the African continent, segments of population and political leaders
mostly in opposition have fallen in love with federalism and demands for a federal state are always in

58 See De Villiers B "Regional government in the new South Africa: the experience of India and Nigeria" 1992
SAPRIPL 91-92; Lenaerts K op cit 257; Watts R op cit 77-85.
59 See Bernhardt quoted by De Villiers B "Regional government..." 91; Riker quoted by Devenish GE op cit 40.
60 Watts R op cit 77.
61 Idem 78.
62 Dugard CJR op cit 241.
63 Van Wyk D "Look at the 'new'..." 98.
64 Rabkin J op cit 1004.
the shape of a “revolt” against or “dissidence” from the existing unitary state. The multiplicity of sub-regional structures in the framework of the Organisation of African Unity also expresses the renaissance of the idea or principle of federalism as a chance for the African Renaissance. Obviously, the revival of the principle of federalism tends to feature the contemporary constitutional law.

1.2 Separation of Powers and Federalism in the new South African Constitution and the Constitutional Court

Separation of powers and federalism may be inferred from the Constitutional Principles set out in the 1993 Constitution (Schedule 4). On the other hand, the Constitutional Court had a crucial role to play in their promotion.

1.2.1 Constitutional Principles

Constitutional Principle VI provided for “a separation of powers between the legislature, executive, and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness”. Linked to separation of powers were, to some extent, other Constitutional Principles (CPs) such as CPs VII and XX in so far as the independence of the judiciary and division of powers and functions they provided for impact on the separation of powers.

Federalism was not as such included among the Constitutional Principles. Nevertheless, some of them might be regarded as designed to promote federalism in the new South Africa. Those were the Constitutional Principles on the following matters:

- supremacy of the Constitution as the supreme law of the land (CP IV), in that the Constitution is the foundation of any state authority and the base of all powers;
- acknowledgement, protection and promotion of the diversity of language and culture (CP XI);
- recognition and protection of collective rights to self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations (CPs XII, XXXIV);
- recognition and protection of the institution, status and role of traditional leadership, according to indigenous law (CP XIII);
- structure of government at national, provincial and local levels (CP XVI);

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— constitutional definition and distribution of exclusive and concurrent powers and functions between the national and provincial levels of government, and resolution of disputes concerning concurrent legislative powers (CPs XVIII; XIX; XX; XXI; XXII; XXIII);

— constitutional framework for local government powers, functions and structures (CP XXIV);

— distribution of fiscal powers and functions between the national government and provincial governments (CP XXV);

— equitable share of revenue collected nationally between different levels of government, especially between provincial and local governments (CP XXVI);

— institution of a Financial and Fiscal Commission to recommend equitable fiscal and financial allocations to the provincial and local governments from revenue collected nationally (CP XXVII).

The Constitutional Principles were more authoritative than other constitutional provisions. They were designed to be an immutable Grundnorm in the true sense. They could not be amended at all and had to be complied with by the national and provincial Constitutions to be adopted.

Although they were contained in the interim Constitution, the Constitutional Principles were drafted with an eye towards the future. They were to govern the "final" national and provincial Constitutions to be drafted (Sections 71(2) and 160 of the 1993 Constitution). Failing compliance with these Constitutional Principles, a Constitution could not be certified by the Constitutional Court and should be of no force and effect.

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66 Van der Vyver JD "The separation of powers" 190.
67 Executive Council of the W(estern) Cape Legislature... v Pres(ident) of the Rep(ublic) of S(outh) A(frica)...
at paras 12895-F, 1291 F-G, 1307E; Constitution of the Republic of South Africa, Act 200 of 1993, Sections 71(2), 74 (2) and 160.
68 The qualification "new" or "final" is often attached to the 1996 Constitution. Yet a Constitution cannot remain new for ever and this is not the last constitutional text in the history of South Africa. It is, however, referred to this Constitution as "new" or "final" in this paper with due regard to authorities and to the Constitution itself (See especially Schedule 6).
1.2.2 The Role of the Constitutional Court and a Purposive Approach to Constitutional Interpretation

In their capacity as guardians of the constitutional and legal order,69 guarantors and interpreters of the Constitution,70 the final referee or independent umpire of the conflicts of competence,71 a paramount responsibility, recognised by many authors,72 lies with the judges in the defence of constitutionalism, especially with the judges of the highest jurisdiction, which is, in South Africa, the Constitutional Court.

The decisions of the Constitutional Court, certifying that a new constitutional text complied with the Constitutional Principles, were final and binding (Sections 71(3) and 160(5)). It is through constitutional interpretation that the highest Court had to play its role of promoting constitutionalism and accordingly the constitutional judges had to use suitable interpretation methods.

The judges reassured us that they were aware of both their responsibility and the fit approach to constitutional interpretation. Indeed, they honestly confessed: "that casts an increased burden on us in deciding on certification. Should we subsequently decide that we erred in certifying we would be powerless to correct the mistake, however manifest.73 Concerning the methods of interpretation, the Constitutional Court solemnly ordered that the Constitutional Principles should not be interpreted with technical rigidity, but should rather be applied "purposively and teleologically" and "read holistically with an integrated approach",74 reminding us of what Carpenter and Botha call "purposive and contextual interpretation".75

The advent of a new constitutional order, founded on a supreme Constitution with a substantive Bill of Rights, in the place of the old order inherited from the Westminster model based on the supremacy of the legislature, has brought about a radical change in constitutional interpretation.

69 See Devenish GE op cit 48; Stern K "The genesis ..." 199.
70 See Daes E-IA The individual's duties to the community and the limitations on human rights and freedoms under article 29 of the Universal Declaration of Human Rights (1983) 113 (Pt 143); 114(Pt 146); Wachtler S op cit 2,7.
71 Devenish GE op cit 48.
74 See idem at paras 1275 E-G, I; 1351 D.
75 Carpenter G & Botha C op cit 130.
In international and comparative law, intentionalist, textualist or purely positivist methods have been found outdated and a purposive, teleological or value-based approach has been adopted as the most appropriate in constitutional interpretation. Apart from a few hesitations, this general trend in international and comparative law required by the interpretation clause (Section 39(1)(b) of the final Constitution) has been followed by South African academics and judges who have also adopted the purposive and value-orientated approach as the soundest and the fittest to the new constitutional order. Purposive and value-based approaches are in fact distinct, yet the interpretation clause makes them nearly synonymous in that the interpreter “must promote the values that underlie an open and democratic society...” Such an approach goes far beyond the interpretation of the Bill of Rights to the Constitution as a whole. Arguably the interpretation clause is a general provision that should have been embodied in Chapter 1 (Founding Provisions) or in Chapter 14 (General Provisions).

Considering the record of the Constitutional Court in some judgments handed down in 1996, Cockrell regretted that “the Constitutional Court has shown an unwillingness fully to embrace the substantive vision of law” required by a purposive approach. The judgments on the Certification of the Constitution of the Republic of South Africa, the Constitution of the Western Cape and the Constitution of the Province of KwaZulu-Natal are likely to be part of what Cockrell called “rainbow jurisprudence”, that is a mixture of a purposive approach and what Du Plessis and De Ville have labelled “literalist-cum-intentionalist approach” to constitutional interpretation.

78 Matiso and Others v Commanding Officer, Port Elisabeth Prison, and Another 1994 (4) SA 592 at paras 593A-B, 597; Qozeleni v Minister of Law and Order and Another 1994 (3) SA 625 at paras 626D, 628D-E; Shabalala and Others v The Attorney-General of Transvaal and Others 1994 (6) BCLR 85 (T) at paras 10OE-G; S v Mhlungu and Others 1995 (2) SACR 277 (CC) at paras 295a-j; Froneman JC op cit 9-12.
79 Cockrell A op cit 10.
80 1996 (10) BCLR 1253 (CC) and 1997 (1) BCLR 1 (CC).
81 1997 (9) BCLR 1167 (CC) and 1997 (12) BCLR 1653 (CC).
82 1996 (11) BCLR 1419 (CC).
83 Cockrell J op cit 1-37.
Although the Constitution entrusted them with final and binding powers in constitutional matters, the judges refrained from exercising their powers fully. From the outset of its judgments on the Certification of the Constitution of the Republic of South Africa, the Constitutional Court ordered:

"First and foremost it must be emphasised that the Court has a judicial and not a political mandate. Its function is clearly spelt out in IC (Interim Constitution, Section 71(2)) : to certify whether all the provisions of the NT (New Text of the Constitution) comply with the CPs (Constitutional Principles). That is a judicial function, a legal exercise. This Court has no power, no mandate and no right to express any view on the political choices made by the CA (Constitutional Assembly) in drafting the NT, save to the extent that such choices may be relevant either to compliance or non-compliance with the CPs. Subject to that qualification, the wisdom or otherwise of any provision of the NT is not this Court's business (My emphasis)".

It is hard to agree with the Constitutional Court that it had "a judicial and not a political mandate" or "no power, no mandate, and no right to express any view on the political choices made by the CA". Indeed, the Court had to "discern in the cacophony of political understanding emerging from the negotiations at Kempton Park and could not be excused for what Lester would have termed "an abdication of judicial responsibility" on the part of the Constitutional Court. Constitutional Principles were to be given a content by the Constitutional Court that was duty-bound to certify whether a new constitutional text complied with them. Dealing with a Constitution, eminently a "political document", and having to interpret it "purposively and teleologically... holistically with an integrated approach" according to its official statement, the Court had to make value-judgements required by that interpretation approach. Constitutional interpretation requires value-systems but also to make hard political choices, which the legislature and executive are often loath to make. Choice and judgment do inhere in interpretation.

Not to misread this we should, however, make it clear, in the words of Carpenter and Botha, that "the recognition of the presence of subjective factors, the determination of societal values and the utilisation of purposive and teleological modes of interpretation do not give any judge carte blanche to decide a case in accordance with whim rather than principle". Nor do they give the Constitutional Court the final political responsibility. Judges cannot usurp the political judgments of the politicians and their powers, as guardians of the Constitution, are fettered by the Constitution itself in terms of the principle of

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85 1996 (10) BCLR 1253 (CC) at paras 1273 G-H and 1997 (1) BCLR 1 (CC) at paras 9 F-H.
86 Simmons C "Unmasking the rhetoric of purpose: the Supreme Court and legislative compromise" 1995 Emory Law Journal 117-124, 129-133.
87 Lester A "English Judges as Law Makers" 1993 Public Law 275.
88 Carpenter G & Botha Op cit 133.
89 See Kruger J Op cit 1-2; Botha H Op cit 233; Du Plessis LM & De Ville J Op cit 392; Feliciano FP Op cit 44 (Footnote 77).
91 Feliciano FP Op cit 40.
92 Op cit 133.
separation of powers. What we mean is rather, that constitutional interpretation cannot be strictly a judicial exercise, totally free from political considerations, especially when a purposive approach is declared to have been adopted. Davis, Chaskalson and De Waal have pointed out that judicial review has a political nature. In the same way, Devenish and Nicholson contend that judicial review, by its very nature, involves a manifestly political role on the part of the courts and that court are involved in policy making.

2 SEPARATION OF POWERS IN THE NEW SOUTH AFRICAN CONSTITUTION

In the judgment on the Certification of the Constitution of the Republic of South Africa, the Constitutional Court observed that "the Montesquieuian principle of a threefold separation of state power - often but an aspirational ideal - did not flourish in South Africa which, under the banner of adherence to the Westminster system of government, actively promoted parliamentary supremacy and domination by the executive". Despite the new constitutional order, founded rather on the supremacy of the Constitution, there is no stricter separation of powers, but collaboration, checks and balances, which impact on the nature of the political regime.

93 Op cit 74 (Footnote 411).
94 Devenish GE op cit 42, 48.
95 Nicholson RD op cit 404-426.
96 1996 (10) BCLR 1253 (CC) at paras 1266 B-C.
2.1 Separation of Powers between the Legislature, Executive and Judiciary

2.1.1 Parliament

In the national sphere of state authority, the legislative authority is vested in Parliament (Chapter 4). Parliament consists of two chambers:

— the National Assembly, which is elected to represent the people and to ensure government by the people; and

— the National Council of Provinces, which represents the provinces to ensure that provincial interests are taken into account in the national sphere of government (Section 42).

The Constitution provides for the composition, membership and functioning of the National Assembly (Sections 46-59, 80) and those of the National Council of Provinces (Sections 60-72). In the exercise of its legislative power, Parliament passes Bills. A Bill assented to and signed by the President becomes an Act of Parliament (Sections 81-82).

2.1.2 The President and National Executive

The executive authority of the Republic is vested in the President, who is the “Head of State and head of the national executive” (Section 83 (a), Chapter 5). The President exercises this authority together with the other members of the Cabinet (Section 85) in the framework of the government of national unity which was compulsory in terms of the interim Constitution and has been maintained provisionally by the 1996 Constitution.

The Cabinet consists of the President, as head of the Cabinet, a Deputy President, and Ministers appointed by the President who may also dismiss them (Section 91(1)-(4)). Some emphasis must, however, be put on the government of national unity given its importance in African constitutionalism and in building a stable and peaceful democracy in Africa.

2.1.2.1 The Government of National Unity

The 1993 Constitution provided for a government of national unity. The concept of a government of national unity consisting of a President elected by and in the National Assembly, an Executive Deputy President to be appointed by each party holding 80 or more seats or by each of the two largest parties in the National Assembly (Section 84(2)), and Ministers and Deputy Ministers from each party holding at least 20 seats in the National Assembly (Sections 86(2); 94), was used about four times in the interim Constitution (Sections 86(2),(3); 86(2) and (5)).
In terms of the 1996 Constitution (Schedule 6 Item 9(1), (2) read with Annexure B items 1, 2, 3, 5 and 6), the government of national unity remains in office until 30 April 1999 despite the fact that the new Constitution as a whole has already come into effect.

Interim governments of national unity and national conferences have been institutionalised in the late 1980s and the early 1990s in some African-French speaking black countries moving away from the one-party system with its "state tribalism".\textsuperscript{97} They had to oppose the one-party "tribal or ethnic government" and its fanciful "national unity" achieved through the politics of "tribal balancing" also called "géo-politique" or "équilibre tribal".\textsuperscript{98}

By establishing a government of national unity as an achievement of its "national conference" held at Kempton Park, South Africa was therefore inspired by French-speaking African "brothers" or shared rather with them the common Negro-African culture of "democracy of the palaver" or "shared democracy" ignoring the "Zero Sum" or the "Winner-Takes-All" rule.

The national conference, the government of national unity and their South African original structure, namely the Truth and Reconciliation Commission, represent the major positive African contribution to contemporary constitutional law and political science.

The merit of South Africans is that they have constitutionalised and enshrined in the "long term" the government of national unity and national conference that have been short-lived in African countries where they were in honour. Unfortunately, the government of national unity will no longer be compulsory after the 1999 elections and we are going to witness the revival of the Western "Zero Sum" or "Winner-Takes-All" rule, that is the majority rule. Nevertheless, there will still be great need for a government of national unity likely to reconcile, not only people in South Africa and in Africa as a whole, but also to reconcile Africa with its worthy history and to promote the African Renaissance.

\textsuperscript{97} Benin, Congo, Gabon, Niger, Tchad, Togo, Zaïre.


2.1.3 Courts

The judicial authority of the Republic is vested in the courts (Section 165). An essential part of the separation of powers is that there must be an independent judiciary.\(^{100}\) In terms of the new Constitution, courts are independent and impartial in the application of the law. Particularly interesting for the purposes of any inquiry about constitutionalism in general and separation of powers and federalism in particular is the Constitutional Court, “the highest court in all constitutional matters” (Section 167(3)). The Constitutional Court performs an umpiring role between the legislature and the executive in cases of conflicts.

2.2 Nature of the Political Regime

The extent of the separation of powers in constitutional states between central organs of state authority, especially between the legislature and the executive, has given rise to two main types of political regime; namely the parliamentary and the presidential. An intermediate type is the semi-presidential or mixed regime which is, however, closer to the parliamentary regime.

The Westminster system is generally referred to as the typical parliamentary regime. This system is essentially characterised, at least formally, by the pre-eminence of Parliament. Duverger considers that the accountability of the Cabinet to Parliament and concurrently, the probability for the latter to be dissolved are the key elements of the parliamentary system.\(^{101}\)

On the other hand, the United States regime is considered as the model of the presidential regime.\(^{102}\) In comparison with the British, the American regime is characterised by a stricter separation of powers and the predominance of the President who is the very “clé de voûte” of state authority or the cornerstone of the regime; hence the name “presidential regime”. Duverger again distinguishes the presidential regime from the parliamentary one on three grounds. First, the executive is not two-headed. The full executive authority is vested in the President who appoints and may also dismiss Ministers and Deputy Ministers. The latter do not form a real Cabinet and are but administrative leaders and President’s collaborators, counsellors or assistants in the same way as Secretaries and Under Secretaries in the American system. Secondly, there is no Prime Minister and the President, who is both the head of state and of government, is elected by universal franchise.

\(^{100}\) Certification of the Constitution of the Republic of South Africa at para 1303D.


Thirdly, the President and Congress (Parliament) are independent of one another while forming a "marriage without divorce".\textsuperscript{103}

Many attempts to adopt the American model in the Third World and especially in Africa have failed so far. The presidential regime has been caricatured and has resulted in what has been called "presidentialism".\textsuperscript{104} Presidentialism means that all powers are vested in the President; there is no separation of powers and very often a unitary or super-party has been established in the state. Such a state cannot be taken for a constitutional state.

The new South African political regime has been inspired both by the Westminster system and the presidential regime.

2.2.1 Parliamentary Legacy

2.2.1.1 Pre-eminence of Parliament

The legislature takes precedence over the executive and Parliament over the President and all other organs of state authority (Section 8(1); Chapter 4). Parliament is also the key organ of co-operative government (Chapter 3, Section 41(2)). As a general rule in African constitutionalism, precedence is, however, given to the President and the executive.\textsuperscript{105}

2.2.1.2 Election of the President by Parliament

The head of state in a parliamentary regime is a figurehead, generally a monarch or a President indirectly elected by the people, namely by people's representatives in Parliament. Section 86(1) provides that the President is elected by the National Assembly and from among its members. The majority of the votes required for the election of the President (Schedule 3, Part A 6(c)) is, however, too weak for a person called to perform the presidential functions and to exercise powers vested both in the President and in the Prime Minister in a typical parliamentary system.

\textsuperscript{103} Duverger M op cit (1975) 167.

\textsuperscript{104} Duverger M op cit (1975) 178; Baldwin FN op cit 85; Mangu MB "Démocratie ..." 25; Idem Le régime pluraliste ... 33; Buchmann J L'Afrique noire indépendante (1962) 252-278.

2.2.1.3 Ministerial Countersignature to Presidential Decisions

In terms of Section 101(2), "a written decision by the President must be countersigned by another Cabinet member if that decision concerns a function assigned to that other Cabinet member". The Cabinet member acting in terms of this Section thereby takes responsibility to the President for the implementation of countersigned decisions. The ministerial countersignature does not, however, have the same significance as in a typical parliamentary system where, the head of state being unaccountable, the Cabinet member who countersigns his/her decision will be accountable to Parliament for the countersigned decision.

2.2.1.4 Membership of Parliament for Cabinet Members

In a parliamentary regime, Cabinet members are also generally members of Parliament, especially of its chamber directly elected by the people. Section 87 provides that when elected President, a person ceases to be a member of the National Assembly, but he must select the Deputy President, Ministers and Deputy Ministers from among the members of the National Assembly (Sections 91(3); 93). Only one or two Ministers can be selected from outside the National Assembly (Section 91(3)(c)).

2.2.1.5 Accountability of the Cabinet to Parliament and Dissolution of the National Assembly

Members of the Cabinet are collectively and individually accountable to Parliament for the exercise of their powers and the performance of their functions (Section 92(2)). If the National Assembly, by a vote supported by a majority of its members, passes a motion of no confidence in the Cabinet excluding the President, the President must reconstitute the Cabinet (Section 102(1). The President has been strangely saved from a compulsory resignation due to a vote of a motion of no confidence in the Cabinet of which he is still the head. The entire Cabinet will resign only when the motion passed is of no confidence in the President (Section 102).

In return, the President must dissolve the National Assembly if it adopts a resolution to dissolve with a supporting vote of a majority of its members and three years have passed since it was elected (Section 50(1)). Nevertheless, this section remains in abeyance until 30 April 1999 (Schedule 6 item (2)). President Nelson Mandela has already announced that he will not stand for the office during the 1999 elections and therefore has no power to dissolve the National Assembly. The Acting President must dissolve the National Assembly if there is a vacancy in the office of President and the National Assembly fails to elect a new President within 30 days after the vacancy occurred (Section 50(2)). Under the final Constitution, Parliament, consisting of the National Assembly and the National Council of Provinces (which has replaced the Senate), has become indissoluble. Only the National Assembly may be dissolved (Sections 49(2); 50), but this dissolution is likely to remain a formal one, given that the requirements of Section 50 will hardly be met in concreto.
The South African Parliament and National Assembly are therefore vested with more powers than under the interim Constitution and their counterparts in a typical parliamentary system. Reasons given in Section 50 for a formal dissolution are also different from those where the National Assembly may be dissolved in a typical parliamentary regime and which were considered in the interim Constitution (vote of a motion of no confidence in the Cabinet: Section 93(1) and (3)).

2.2.2 Presidential Legacy

2.2.2.1 Predominance of the President

The President is the head of the national executive. He presides over the Cabinet and in the absence of the office of Prime Minister, he is de facto Prime Minister. He not only "reigns", but also governs effectively.

2.2.2.2 Responsibility of other Cabinet Members to the President

The President appoints and may dismiss the other members of the Cabinet. The Deputy President, Ministers and Deputy Ministers are but his/her counsellors and assistants who have to perform the powers and functions vested in them by the President and are accordingly responsible to him (Sections 91(2)–(5); 92(1)–(2); 93).

In some respects, such as the appointment of Cabinet members without reference to Parliament or leaders of political parties in Parliament, the next South African President will be entitled formally to more powers than the interim President, who is bound to perform his functions in the framework of the government of national unity, or than the American President who has to suffer from the intervention of Congress, especially the Senate, in making appointments. In some others (election by the National Assembly, accountability to the National Assembly as a Cabinet member with the possibility of removal from office of the President and his/her Cabinet), the powers of the President are much weaker than those of his American counterpart. Nevertheless, the procedure for the removal from office of the President (Section 89) is likely to remind us of the American "impeachment".

It follows from the inquiry into the separation of powers that South Africa under the new Constitution meets the minimum requirements of this principle. The political regime borrows extensively from parliamentarism and some of its aspects in regard to the President and national executive are germane to the presidential regime. This is a hybrid political regime, but in essence a sui generis parliamentary regime with an independent judiciary which emphasises the separation of powers. As for the principle of federalism, it has been also addressed by the new Constitution.
3 FEDERALISM IN THE NEW SOUTH AFRICAN CONSTITUTION

One of the most emotional and contentious debates took place during the negotiations at Kempton Park as to whether the inaugural Constitution of the new South Africa was to provide for a federal or a unitary state. The two leading parties disagreed. The African National Congress (ANC) demanded a unitary system while the National Party (NP) was for a federal state.

Klaaren points out that two models of federalism were competing at Kempton Park: federalism as a matter of dividing up spheres of competence and mechanism for resolving conflicts (dominant model); and federalism negotiation, the vision of federalism co-operation or "co-operative federalism" well known in German constitutional law. Division of powers and co-operation are, nevertheless, both part and parcel of any model of federalism. The end of the debate between federalists and unitarists was "compromise" and silence.

3.1 Federalism

The new Constitution intends to establish co-operative government (Chapter 3).

In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated (Section 40(1)). All spheres of government and all organs of state within each sphere must observe and adhere to the "Principles of co-operative government and intergovernmental relations" (Sections 40; 41).

An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle it and exhaust all other remedies before it approaches a court (Section 41(3)). In the same spirit of co-operative government, a court may refer a dispute back to the organs of state involved in it if it is not satisfied that all other means have been used to settle that dispute (Section 41(4)). Moreover, when considering an apparent conflict between national and provincial legislation, every court must prefer any reasonable interpretation of the legislation that avoids a conflict over any alternative interpretation that results in a conflict (Section 150).

106 See De Ville J "The guidelines for judicial review on 'division of powers' grounds" 1995 Stell LR 139; De Villiers B "Federalism in South Africa ..." 374-375, Idem "Regional government..." 112-113; Devenish GE op cit 38.
107 Devenish GE op cit 35-37.
108 Klaaren J "Federalism" in Chaskalson M et al (eds) op cit 5.1-5.2.
109 Davis D, Chaskalson M & De Waal J op cit 115.
110 Elazar Dj op cit 30.
The participation of both provincial and local government representatives in the proceedings of the National Council of Provinces (Sections 60 and 67) makes Parliament the pre-eminent framework of co-operative government.

As previously stated, the participation of provinces or states in the central government is one of the key elements of federalism. The major characteristic of federalism remains, however, the constitutional division of powers, especially that of the legislative powers and financial resources between central and provincial governments.

In the national sphere, Parliament exercises powers in accordance with the procedure set out in the Constitution (Sections 44, 73-78). It may amend the Constitution or assign any of its legislative powers, excluding the amendment of the Constitution, to any legislative body in any other sphere of government. Inspired by German constitutional law, this principle of "executive federalism" is, however, hardly enforceable when the majority party is decidedly anti-federalist. Parliament may intervene by passing legislation with regard to any matter within functional areas of concurrent national and provincial legislative competence (Schedule 4 read with Sections 44(1),(3), 146; and 147(1)) or within functional areas of exclusive provincial legislative competence (Schedule 5 read with Sections 44(2); 76(1); and 147(2). The Constitutional Court admitted that "this is a general plenary legislative competence and is not confined to specific functional areas". On the other hand, the national executive may intervene by taking any appropriate steps to ensure fulfilment of an executive obligation when a province cannot or does not fulfil it in terms of legislation or the Constitution (Section 100).

In the provincial sphere of government, the legislative authority vests in the provincial legislature (Sections 104; 114) and the executive authority lies in the Premier who exercises it together with the other members of the Executive Council (Section 125). A provincial legislature may adopt a Constitution (Section 104(1)(a)) and other legislation for its province with regard to any matter within a functional area listed in Schedule 4 and in Schedule 5 (Section 104(b)).

An Act of Parliament must provide for appropriate structures and procedures to facilitate intergovernmental relations or to settle intergovernmental disputes (Section 41(2)) which are likely to arise within the functional areas listed in Schedule 4 and in Schedule 5.

\(^{111}\) Lenaerts K op cit 230-233.  
\(^{112}\) See Certification of the Constitution of the Republic of South Africa at para 1351 G; Certification of the Constitution of the Province of KwaZulu-Natal at para 1424 D.
The exercise of the power of intervention by the national legislature and the ways in which conflicts between laws are to be resolved, emphasise the extent of provincial competence and may serve as a standard to assess the degree of federalism in the new South African Constitution. In case of conflicting laws (Sections 146-150), as a matter of principle, a “paramountcy”, an override or pre-emption is recognised to national over provincial legislation. It is symptomatic that the phrase “National legislation (or an Act of Parliament) prevails over provincial legislation (provincial Act or provision of the provincial Constitution)” is repeated seven times (Sections 146(2), (3),(6); 147(1) (a), (b), (2); and 148) and the reverse only once (Section 146(5)). Parliament has then been made the legislator-in-chief.

Another limit to federalism is to be found in the distribution of finances between the provincial and national governments (Chapter 13). Financial matters are ruled by Parliament. It must establish a national treasury, which, with the concurrence of the Cabinet member responsible for national financial matters, may stop the transfer of funds to an organ of state or to a province (Section 216). There was no equivalent provision in the 1993 Constitution.

When the component units of a state are too dependent on the central government for financial or other resources, this gives rise to greater unitary government but can precipitate “separatist movements”. On the other hand, “a federal system requires authentic autonomy, involving not merely the structures of provincial government, but effective self-government, which in turn requires fiscal and financial viability”.

Co-operative government in South Africa then results in a constitutional tutelage of national government over provincial government, but provinces do have some competence they effectively exercise.

With the reduction of provincial powers as recognised by the Constitutional Court itself, the “quasi-federalism” of the 1993 Constitution has been lessened and the system appears rather to be one of a regionalised unitary state. Following close behind the interim Constitution, the new South African Constitution presents strong federalist features, but does not establish a fully-fledged federation. South Africa cannot take blame for that. After all, a very few countries have gone such a long way with federalism. Besides, no state can become a federal one overnight; the process has always been a long and gradual one.

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See Klaaren J op cit 5.2-5.7; De Ville J op cit 139, 150, 159.

Devenish GE op cit 46.

Idem 35.

Certification of the Amended Text of the Constitution of the Republic of South Africa 1997 (1) BCLR 1 (CC) at para 60 G.

Devenish GE op cit 37-38; Elazar DJ op cit 35; Klaaren J op cit 5.1.

Watts RL op cit 85.
Even the Egyptian pyramids, which bear witness to the imperial and leading role played by Africa in the world throughout the first three historical millennia, were not built in a day.

Nevertheless, it must be underscored that with the adoption of the Constitution by an overwhelmingly ANC-dominated Constitutional Assembly, the form of state, which was adopted, corresponds globally to views expressed by the ANC during the negotiations. More reserved and conciliating at Kempton Park, the ANC representatives in the Constitutional Assembly took advantage of their fresh election by the people to nibble at the Constitutional Principles in order to implement their own model form of state.

Given the ideology of the ANC, which admittedly will be the majority party for a long time, will we come to celebrate the requiem of the federal idea or principle in South Africa?

3.2 Prospects of Federalism in South Africa

The role to be played by the Constitutional Court is worth dwelling upon as far as prospects of federalism are concerned. According to Devenish, the role of the judiciary as the interpreter of the Constitution and the guardian of the constitutional order is of seminal importance. In America, judicial power has developed into "a central component of the American concept of federalism" while in a case as close to the South African as that of Canada, which has come to federalism by devolution, although the Canadian Constitution is theoretically quasi-federal, "judicial interpretation has... made it approach the American model." Much will depend on how the Constitutional Court interprets and applies the constitutional provisions to settle disputes, which will certainly be about "shared rule and self-rule". The Constitutional Court will constantly have to adopt a teleological, purposive and contextual interpretation of the supreme Constitution and to jettison once and for all the wavering approach resulting in a "rainbow jurisprudence".

Devenish emphasises that "the role of the Constitutional Court will be crucial in this regard and will most certainly not be purely jurisprudential, but quasi-political." As said above, judicial review by its very nature involves a manifestly political role on the part of the courts.
In *Executive Council of the Western Cape Legislature v President of the Republic of South Africa*, the Constitutional Court declared unconstitutional Section 14 A of the Local Government Transition Act 209 of 1995 in terms of which Parliament had delegated to the President power which infringed on provincial powers, and at the same time nullified presidential Proclamations R 58 and 52 based on that Act.\(^{123}\)

Yet the tone it used thereafter to rebuke the Western Cape and KwaZulu-Natal provinces claiming more power and autonomy through their Constitutions revealed that the constitutional judges were not keen enough on federalism. The Constitutional Court repeated that "the provinces are not sovereign states"\(^ {124}\) and did not even react to a submission made on behalf of the ANC that the state established by the new Constitution was "the unitary state".\(^ {125}\)

Arguably, the judges are not constitutionally bound to be pro-federalism. In the same way, they are not bound to be contra-federalism or pro-unitarianism. However, the constitutional judges may indisputably play a very important role in the promotion of federalism, particularly when the Constitution "must" be interpreted purposively as ordered by the Constitutional Court itself.

The promotion of federalism will also depend upon the engagement of political parties and leaders, especially those in opposition, to support it, given that a ruling party is likely to oppose it. Men in power tend to be more centralist and unitarist, but more democratic and federalist when they have come to lose power and to find themselves in opposition.

The ANC-led government tends to be, as a member of the Transitional Executive Council predicted, "a vacuum-cleaner sucking up every possible power".\(^ {126}\) Lawrence\(^ {127}\) warned that "unless the provincial Premiers actively champion regional interests the probabilities are strong that South Africa will again witness the decline and fall of provincial governments".

Thanks to Western Cape and KwaZulu-Natal, a constitutional jurisprudence on federalism is developing. These provinces have been until now the sole attackers of the central government on the

\(^{123}\) See *Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others* at paras 1339F-J; Klaaren J "Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others CCT/27/95; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC)" 1996 SAJHR 158-162.

\(^{124}\) See *Certification of the Constitution of the Province of KwaZulu-Natal* at para 1426D; *Certification of the Constitution of the Republic of South Africa* at paras 1341G, 1363D-E.

\(^{125}\) See *Certification of the Constitution of the Western Cape* at para 1183 B.

\(^{126}\) Quoted by Devenish GE *op cit* 44 (Footnote 47).
grounds of the division of powers in asserting more powers and autonomy and adopting their own Constitutions.\textsuperscript{128}

South Africa has therefore embarked on an asymmetrical federalism in which the powers and functions of the provinces differ from one another depending on political and administrative considerations.\textsuperscript{129}

Some of the sub-units, the ANC-led provinces, will be willing to give up more powers to the national government than the others. It is likely that both Western Cape and KwaZulu-Natal will promote the cause of a strong autonomy.\textsuperscript{130}

Moreover, territorial federalism is more likely to be preferred to personal federalism,\textsuperscript{131} which is a racial, tribal or ethnic federalism, and which seems mostly favoured by the Afrikaner and the Zulu peoples, in their respective provinces of Western Cape and KwaZulu-Natal. This racial/ethnic/tribal federalism as claimed in many African countries has already proven explosive in the old South Africa and in many other countries. True federalism cannot be built on racism, tribalism or religious fundamentalism. To succeed, federalism requires national unity or some kind of national consensus.

CONCLUSION

Constitutionalism has been and is still suffering in many African countries. Thus steps taken by one of them to get in line with the minimum requirements of a constitutional state deserve appreciation.

Since the coming into operation of the 1993 Constitution now replaced by the 1996 Constitution, South Africa has divorced itself from the old system inherited from the Westminster model of parliamentary sovereignty and has embraced a new legal order based on the supremacy of the Constitution containing a substantive Bill of Rights and recognising, among other principles, those of separation of powers and federalism. These principles proceed from constitutionalism and presuppose limitation and division of powers.

The new South African Constitution establishes a constitutional state that is one of the exceptional brilliant stars in the dark night of authoritarianism in Africa. An inquiry into the importance attached to

\textsuperscript{128} Constitution of the Province of KwaZulu-Natal, adopted on 15 March 1996 (Failed certification by the Constitutional Court, see supra, Certification of the Constitution of the Province of KwaZulu-Natal at paras 1437 E-I and Constitution of the Western Cape adopted in February 1997 (Failed also certification, see Certification of the Constitution of the Western Cape at paras 1197F-I, but was finally certified on amendment, see Certification of the Amended Text of the Constitution of the Western Cape at para 1654F).

\textsuperscript{129} See Devenish GE op cit 44; De Villiers B “Federalism in South Africa...” 362-384.

\textsuperscript{130} See Devenish GE op cit 43-44; Klaaren J “Executive Council, Western Cape Legislature...v President of the Republic of South Africa...” 158-162; Gotz A “Premier of KwaZulu-Natal and Others v President of the Republic of South Africa and Others CCT/36/95; 1995 (12) BCLR 1651 (CC)” 1996 SAJHR 166-172 and n 128 above.

\textsuperscript{131} On territorial and personal, corporate or non-territorial federalism, see De Villiers B “Federalism in South Africa...” 377-382; Devenish GE op cit 37.
the principles of separation of powers and federalism in South Africa awakening to constitutionalism is likely to bring to light the very nature and importance of constitutional and political mutations occurring in Africa in this last decade of the second historical millennium and may help to assess the chance of the African Renaissance on the eve of the third millennium.

The implementation of the principle of separation of powers has resulted in a hybrid political regime borrowing both from the Westminster model and the presidential one, but which is heavily inclined towards parliamentarism.

On the other hand, South Africa has also been confronted with the principle of federalism. The new constitutional order takes federalism into consideration seriously, but the South African state has not become a fully-fledged federation. Despite the case of Nigeria which in fact functions as a unitary state, regularly under generals’ heels, federalism has up to now been an unsuccessful endeavour in Africa. After decades of apartheid, South Africa will have to face issues related to federalism and much will depend on the genius of men in power today and on those in opposition to settle these problems likely to threaten the life of this still stumbling nation. At the same time, however exciting federalism may be, South Africa, like many other African countries, will have to address the issue of personal or corporate federalism which may jeopardise the national unity.

The Constitutional Court, in its capacity of guardian and interpreter of the Constitution, stands as the official guardian of constitutionalism to avoid one centralising apartheid or authoritarianism replacing another. In this regard, judges should preserve their independence, and their judgments, based on a purposive, value-based and holistic approach to constitutional interpretation, will necessarily have some political content.

Anyway, the Constitutional Court does not enjoy unlimited powers. It is limited by the Constitution. The supremacy of the latter does not mean that the supremacy of Parliament under the old order has now been exchanged for that of the judiciary or that an imperial executive should be traded for an imperial judiciary. On the other hand, a Constitution has never been embedded in stone. Unlike the German Constitution of which some provisions, namely those proclaiming that the “dignity of man is inviolable” (Article 1 GG) and that Germany is a “democratic, social and federal Rechtsstaat” (Article 20 GG) are not amendable in terms of Article 79.3 GG, the new South African Constitution is completely amendable. There is a risk that the ANC may gain a two-thirds parliamentary majority empowering it to amend nearly all constitutional provisions (Section 74) and to establish a really centralised state.

132 Carpenter G & Botha C op cit 135.
133 See Davis D, Chaskalson M & De Waal J op cit 70; Stern K “A society...” 243.
The success of constitutionalism and democracy requires a strong political culture from the majority of the people, governed and also from the leaders. Constitutionalism and democracy are concerned mainly with political education and culture. Such a culture has to be built. The lack of political culture of constitutionalism, human rights and democracy, has often been cited by African intellectuals to explain authoritarianism and genocide in Africa. Unfortunately, it is so often forgotten that political culture is formed and entertained by several factors and prominent among them are works of intellectuals. A very important role is therefore to be played by intellectuals, political and civil societies in general and by lawyers and academic lawyers in particular.

The African Renaissance, which means development at the very least, requires a return to constitutionalism, democracy, and respect for human rights and integration or continental federalism. "European Renaissance", for instance, has required democracy and called for a confederation in the framework of the European Union. In Africa, the idea of "the United States of Africa" launched by N'Krumah has not yet gone beyond the Organisation of African Unity. But interestingly, albeit still purely academic, some African peoples in their Constitutions consent to limitations of their sovereignty to build Africa into a confederal context. South Africa still ignores Africa in her constitutional law, but her new Constitution provides for a constitutional state founded on some acceptable separation of powers and federalism. The result is a well matched marriage between semi-parliamentarism and quasi-federalism, which is obviously the South African contribution to constitutionalism and democracy required by the African Renaissance.

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134 See Bakary AT op cit 50; Lévy MB-B Eloge des Intellectuels (1987); Sartre JP Plaidoyer pour les Intellectuels (1972).
136 See Constitution of the Republic of Zaire, 1994, Preamble and Article115; Constitution of the Republic Federal of Congo (Draft), 1992, Preamble and Article200; Constitution of the Republic of Senegal, 1992, Preamble; Constitution of Burkina Faso, 1997, Preamble and Title XII, Article 46. The Constitution of Burkina Faso provides expressly for a total (My emphasis) or partial abandon of sovereignty to enter into a Confederation, a Federation or a Union of African States. Arguably, African French-speaking countries are committed to building African Unity and achieving federalism at a continental or regional level more than African English-speaking countries. Belonging to Africa is still a strong feeling to be instilled in the thinking of the majority of Peoples and leaders of the continent.
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